No. 20099

United States
Court of Appeals
for the Ninth Circuit

JACQUES ARLEY and CHARLOTTE ARLEY,
husband and wife,

Appellants,

v.

UNITED PACIFIC INSURANCE COMPANY,
a Washington corporation,

Appellee.

Appeal from the United States District Court
for the District of Oregon

BRIEF FOR APPELLANTS

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JURISDICTION

This litigation was initiated by United Pacific Insurance Company, appellee, on a civil complaint in equity to rescind a fire policy issued to Jacques Arley and Charlotte Arley, appellants, on property near Verdi, Nevada.

Jurisdiction is based upon diversity of citzenship (28 U.S.C. sec. 1332). It is admitted that United Pacific Insurance Company is a Washington corporation and that the sum in controversy exclusive of interest

and costs exceeds $10,000. (pretrial order, R. 53, 54). Appellants are not citizens of the state of Washington. (Tr. 181).

The trial court of its own initiative and with a jury impanelled to determine the question of liability on the policy tried appellee's suit as an action for declaratory judgment. (Tr. 6). The jury returned a general verdict for appellee on December 17, 1964 (R. 63) On December 23, 1964, appellants filed a motion for judgment notwithstanding the verdict, or alternatively for a new trial (R. 64-66). Judgment was entered on December 23, 1964 (R. 68, 69). Appellants' motion was denied on February 2, 1965 (R. 71, 72). Notice of Appeal was filed on February 26, 1965 (R. 73). Jurisdiction of this court to review the judgment is based upon 28 U.S.C. sec. 1291.

STATEMENT OF THE CASE

The Facts

Appellants are husband and wife and were married in 1954 (Tr. 245). On September 10, 1955, they purchased real property near Verdi, Nevada, consisting of a two story frame dwelling with adjacent guest house. The initial fire coverage on this property was obtained through an insurance agency in Reno, Nevada (Tr. 182, 216). Appellants also own real property in Sparks, Nevada (Tr. 62).

Sometime in 1958, appellant Jacques Arley became associated with Montag Furnace Company in Portland, Oregon, and appellants rented an apartment there. (Tr. 179, 180). Appellant Charlotte Arley retained her membership in the Nevada State Bar and continues to vote in Nevada (R. 9, Tr. 60, 181). Jacques Arley is not registered to vote (Tr. 181).

Early in 1958 appellants were introduced to Roger Chaney through an employee of Liberty Mutual Insurance Company who carried some of their coverage (Tr. 217). Mr. Chaney was an insurance agent whose agency was the R. A. Chaney Company, writing all lines of insurance. (Tr. 59). Over a period of time Mr. Chaney wrote appellants' coverage for auto, fire, liability, life, health & accident and floater policies. (Tr. 61, 217). Fire policies on both Nevada properties were written by Standard Accident Insurance Com-

pany, through Mr. Chaney, effective January 28, 1958, for a period of three years. Verdi coverage was for $15,00.00 on the main dwelling and $5000.00 on the guest house. The Sparks policy was cancelled in October 1960, and the Verdi policy was cancelled effective November 25, 1960, with notice of cancellation going to Roger Chaney (Tr. 62, 63, 85).

On January 1, 1961, R. A. Chaney merged its business with the Larry C. Nelson General Agency. Mr. Chaney transferred all of his accounts, including the policies of Jacques and Charlotte Arley, to the Larry Nelson Agency (Tr. 11, 12, 83). Mr. Chaney continued to handle the Arley account (Tr. 39, 50, 233). Commissions on all new business were shared by Nelson and Chaney on a fifty-fifty basis. (Tr. 25).

On or about October 30 or 31, 1962, Mr. Chaney delivered a floater policy to Mrs. Arley (Tr. 89). Mrs. Arley was preparing to leave for Reno. She told Mr. Chaney she had discovered there apparently had been no coverage on the Verdi property during 1961 and that she would place coverage either with Mr. Greenspan in Reno or with Mr. Chaney (Tr. 187, 188.) Mrs. Arley stated she did not want to be covered in Standard Accident or in another mutual company. (Tr. 90, 187). Mr. Chaney said they had a good northwest outfit and that he would cover her effective immediately with United Pacific Insurance Company (R. 89-91, 100, 188). Mrs. Arley gave Mr.

Chaney the Standard Insurance Company memorandum of insurance on the Verdi property, told him it was to be the same except that coverage on the main house was to be increased by $2500 because of improvements that had been made (Tr. 54, 55, 68, 91, 187, 188). Mrs. Arley left for Reno and relying on what Mr. Chaney had told her made no attempt to obtain coverage in Reno. She returned to Portland on November 24, 1962 (Tr. 221, 224). Sometime in middle December, 1962, Mr. Chaney again told her she was covered (Tr. 92, 93, 225, 226).

In the early hours of January 16, 1963, fire destroyed the main dwelling. Mrs. Arley reported the loss to Mr. Chaney and asked if she should confirm this notice in writing to the company. Mr. Chaney said he was the agent, this was unnecessary and that he would go right over there (Tr. 192, 193).

On or about March 5, 1963, appellants received by mail from the Larry Nelson Agency, United Pacific Insurance Company policy F78185 (Def.'s Exh. No. 52) together with Mr. Nelson's statement for the policy premium. (Def's Exh. No. 57). Appellants forwarded their check dated March 9, 1963 to Nelson for the premium (Tr. 229).

Earlier Mrs. Arley had been in Reno to inspect the loss with the General Adjustment Bureau adjuster.

Her time for filing proof of loss was extended until the middle of April, 1963 (Tr. 229-231).

By letter dated April 2, 1963, United Pacific Insurance Company wrote to appellants denying coverage on the following grounds: (Pl. Exh. 56)

> "As you know, without any disclosure to the Company, the property for which coverage was requested had been damaged by fire prior to the time the application for insurance was made or any policy issued. Therefore, under the circumstances, such policy is void and of no force and effect and is rescinded as of its inception date.
>
> "Even if this was a valid policy, which we emphatically deny, it appears that your refusal to give a statement under oath concerning the loss, as would be required by the terms of this and any standard fire policy would breach the conditions and further invalidate any alleged existing policy."

Background of Litigation

On April 4, 1963, United Pacific Insurance Company filed its complaint in equity in the United States District Court for the District of Oregon to rescind its policy. (R. 1-4).

On April 30, 1963, appellants filed a motion to dismiss for improper venue (R. 8).

On May 1, 1963, appellants moved to require ap-

pellee to set forth with particularity the "mistake" alleged in their complaint. (R. 11, 12).

On June 10, 1963, appellee filed its amended complaint (R. 16).

On June 20, 1963, appellants filed a motion to dismiss the amended complaint on the ground it failed to state a claim upon which relief could be granted, there being no allegation of lack of a plain, speedy and adequate remedy at law. (R. 21, 22)

On July 5, 1963, appellants filed an action at law on the policy in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. (R. 30)

On July 29, 1963, United Pacific Insurance Company petitioned to remove said action at law to the United States District Court for the District of Nevada (R. 31).

On July 30, 1963, appellants filed their answer to appellee's amended complaint, affirmatively alleging improper venue and want of equity. (R. 25, 26)

On October 25, 1963, appellants filed a motion for summary judgment for want of equity (R. 28-33).

On April 17, 1964, appellants filed a motion to stay

proceedings or in the alternative to transfer to the District of Nevada. (R. 36-39).

On April 13, 1964, the Nevada Court entered an order granting a stay of proceedings on account of the pendency of the Oregon action (R. 42)

On July 20, 1964, appellants moved for certification under 28 U.S.C. section 1292(b) on the question whether an adequate remedy at law is lacking. (R. 43-46).

On August 11, 1964, the Court ordered appellants to file their counterclaim (R. 48, 49).

On October 1, 1964, the court advised counsel by letter that the court was "giving serious consideration to submitting to a jury all of the issues of fact in this case."

Pre-trial order was lodged on September 29, 1964. (R. 53-62, 90).

On December 11, 1964, appellants moved for summary judgment on the ground appellee was estopped to deny the validity of its policy because it was procurred through its authorized agent. (R. 50).

All of appellants' motions were denied.

The pre-trial order was filed on December 15, 1964. (R. 53).

The case was tried on December 15-17, 1964, as an action for declaratory judgment with a jury impanelled by the court (Tr. 1).

At the close of trial appellants moved for a directed verdict. (Tr. 251).

The jury returned a general verdict for appellee. (R. 63).

On December 23, 1964 appellants filed a motion for judgment notwithstanding the verdict, or alternatively for a new trial. (R. 64-66).

On December 23, 1964, the court adopting the verdict of the jury entered judgment for appellee (R. 69).

Appellants' motions for new trial and for judgment notwithstanding verdict, were denied on February 2, 1965. (R. 71, 72).

THE CONTROVERSY

The ultimate question in this case is whether the court should have dismissed appellee's suit.

The case having been tried, an additional question presented is whether appellants were denied their constitutional right to trial by jury by the method of trial.

A further question raised is whether under Oregon law a licensed solicitor may act as a broker for an assured.

Appellants contend that equity jurisdiction was lacking and that the court should have dismissed appellee's suit, allowing appellants to proceed in their pending action at law.

The court held it had equity jurisdiction (R. 48, 49), and by its judgment entered December 23, 1964, ordered "that the policy of insurance No. F 78185, issued by plaintiff to defendants be, and the same is hereby, cancelled, rescinded and held for naught; and that defendants' counterclaim be, and the same is hereby, dismissed with prejudice." (R. 69).

Appeal is from the Judgment of the Court.

SPECIFICATIONS OF ERROR

The basic error of the trial court was in failing to dismiss appellee's suit for want of equity. It was additional error for the court of its own motion to try appellee's suit as an action for declaratory judgment with a jury to try out the issue of liability on the policy, instead of allowing appellants to proceed with a common law jury in their pending action at law. (Tr. 2).

The court stated after trial, in its judgment dated December 23, 1964, that the cause was submitted to the jury as an action at law, but if in the event of appeal the Court of Appeals should hold that this cause should have been tried as a suit in equity, the court was in full agreement with the jury on the issues submitted. (R. 68, 69). The specification of error which follow are based on this posture of the case.

1. The court erred in denying appellants' motion to dismiss for improper venue. (R. 8, 14).

2. The court erred in denying appellants' motion to require appellee to set forth the circumstances constituting the alleged mistake. (R. 11, 12, 14).

3. The court erred in denying appellants' motion to dismiss appellee's amended complaint for failing to state a claim upon which relief could be granted or in the alternative to strike. (R. 21, 24).

4. The court erred in denying appellants' motion for summary judgment for want of equity. (R. 28-33, 35).

5. The court erred in denying appellants' motion to stay proceedings or in the alternative to transfer to Nevada. (R. 36-39, 41-42).

6. The court erred in denying appellants' motion for certification under 28 U.S.C. section 1292(b). (R. 43-46, 48-49).

7. The court erred in requiring appellants to file their counterclaim on the policy (R. 49).

8. The court erred in denying appellants' motion for summary judgment made on the ground that the policy issued was procured through a licensed agent of the company. (R. 50-51, Tr. 4).

9. The court having required appellants to file their counterclaim erred in trying appellee's suit to cancel, prior to the counterclaim at law. (Tr. 2).

10. The court erred in denying appellants' motion for summary judgment on the opening statement of counsel for appellee. (Tr. 36).

11. The court erred in overruling appellants' contention that no defense was available to appellee except its asserted allegation that defendants had failed to disclose to plaintiff that the property had been

damaged by fire prior to the time application for insurance was made, as stated in its letter of April 2, 1963. (Pretrial order, paragraph V, R. 57) .

12. The court erred in denying appellants' motion for a directed verdict. (Tr. 251).

13. The court erred in failing to submit special interragotories to the jury. (Tr. 253).

14. The court erred in adopting the verdict of the jury. (Judgment, R. 68, 69).

14(a) The court erred in failing to make findings of fact and conclusions of law.

15. The court erred in entering judgment for appellee, and making the following order therein:

> "that the policy of insurance No. F 78185, issued by plaintiff to defendants be, and the same is hereby, cancelled, rescinded and held for naught; and that defendants' counterclaim be, and the same is hereby, dismissed with prejudice." (R. 69).

16. The court erred in denying appellants' motion for judgment notwithstanding the verdict, or alternatively, for a new trial. (R. 64-66, 71, 72).

17. The court erred in admitting over appellants' objection as being incompetent, testimony of Mr. Nelson that Mr. Chaney had come to him in early sum-

mer 1962 and asked that insurance be placed on the Verdi property, and that Mr. Nelson told Chaney they couldn't do it because they had no nonresident license for Nevada. (Tr. 13, 14).

18. The court erred in admitting over appellants' objection as being immaterial testimony of Mr. Chaney that Mr. Nelson's nonresident's license had expired just about the time Mrs. Arley had requested Chaney to place coverage in the summer of 1962. (Tr. 69).

19. The court erred in admitting over appellants' objection as being hearsay, Mr. Chaney's testimony that he called another insurance company and a general agency about getting the Arleys' business placed (Tr. 70).

20. The court erred in admitting over appellants' objection that United Pacific was a corporation and could act only through its agents, Mr. Chaney's testimony that at the time he ordered the policy he had not told "United Pacific" the property had been damaged. (Tr. 76).

21. The court erred in admitting over appellants' objection that it was not competent or material and that United Pacific was estopped to assert or to alter the terms of the policy, testimony of Mr. Chaney that when he ordered the policy, not having taken care of placing the business, he asked to have the policy dated

effective January 12, 1963, because in order to have the loss covered, the policy had to be dated something beyond the 15th." (Tr. 76, 77).

22. The court erred in admitting over appellants' objection, testimony of Mr. Chaney that his reason for asking Mr. Nelson whether he, Chaney, could write insurance on the Verdi property was strictly a matter of the nonresident license and their being unable to participate in the commission. (Tr. 99).

23. The court erred in admitting over appellants' objection as hearsay and incompetent, testimony of John Smith that Roger Chaney had asked if Smith would write fire insurance on the Arley property (Tr. 124).

24. The court erred in admitting over appellants' objection as incompetent, testimony of Linda Upton, former policy writer for appellee, that when the memorandum for coverage came to her desk, she had no knowledge of any loss (Tr. 131).

25. The court erred in admitting over appellants' objection as hearsay and incompetent, testimony of Mr. Courtney, staff claims adjuster for appellee, that on January 17, 1963, Chaney had told Courtney that he, Chaney, had a serious problem and needed help; that he had been too busy with windstorm claims and had overlooked it or hadn't gotten around to it, but had

allowed a very important risk to lapse by about eleven days. That he had heard there had been about a fifty dollar loss on this property in Nevada and he asked Courtney if he would bind coverage for him to cover this loss. Courtney told Chaney to go to the underwriters (Tr. 144).

26. The court erred in admitting over appellants' objection as having occurred after the loss and incompetent, testimony of Mr. Marks, GAB adjuster, that he first got the assignment of claim from Mr. Chaney on March 5, 1963. (Tr. 166).

27. The court erred in admitting over appellants' objection as incompetent, testimony of Mr. Reinhard, claims manager of appellee, that he did not know that Mr. Chaney had assigned the claim to General Adjustment Bureau (Tr. 177).

28. The court erred in admitting over appellants' objection as not competent appellee's Exhibit 8, the United Pacific Insurance Co., file. (Tr. 149, 152, 213).

29. The court erred in refusing to admit in evidence appellants' exhibit 54, the Standard Accident memorandum of insurance on the Sparks property, to indicate that the memorandum Mrs. Arley handed Mr. Chaney on October 30 or 31, 1962, was the memorandum on the Verdi property. (R. 250).

29 (a). The court erred in sustaining appellees objection to the admission of Roger Chaney's testimony which would have stated whether Roger Chaney could have done in October or November of 1962, exactly what he did in January, February and March of 1963. (Tr. 98).

30. The court erred in failing to give appellants' requested instruction No. 1, as follows:

> You are instructed that the plaintiff United Pacific Insurance Company is a corporation, organized and existing under and by virtue of the laws of the state of Washington. Under the admitted facts in this case, United Pacific Insurance Company was licensed to engage in the sale of fire insurance policies for premiums paid to the plaintiff by purchasers of fire insurance policies within the state of Oregon and within the state of Nevada.
>
> Under the undisputed evidence in this case, the witness Larry C. Nelson at all times material, was a duly licensed insurance agent of the state of Oregon. Under the undisputed evidence in this case, also the witness Roger A. Chaney was a duly licensed insurance solicitor of the state of Oregon.
>
> You are instructed that under the law United Pacific Insurance Company had legal authority to sell fire insurance upon property located either in the state of Oregon or the state of Nevada. (*Hahn v. Guardian Assurance Co.*, 23 Or 576). Therefore, if you find that the witness Roger Chaney agreed with the defendants Jacques Arley or Charlotte Arley to cover dwellings of the de-

fendants located within the state of Nevada, then your verdict will be in favor of the defendants since the witness Roger Chaney would be the agent of the United Pacific Insurance Company.

31. The court erred in failing to give appellants' requested instruction No. 2, ar follows:

It is contended by the plaintiff United Pacific Insurance Company that Roger Chaney was the agent of the defendants Mr. and Mrs. Arley. In this respect, if you find from the evidence in this case that Larry C. Nelson Insurance Agency had an agreement or arrangement with the United Pacific Insurance Company, the plaintiff, whereby Larry C. Nelson was to be paid commissions upon business that Larry C. Nelson or Roger Chaney brought to the plaintiff United Pacific Insurance Company, and that United Pacific Insurance Com pany was accustomed to write policies of insurance upon risks solicited by Larry C. Nelson Agency, or by Roger Chaney, and that Larry C. Nelson delivered the policy of fire insurance covering the defendants' property located near Verdi, Nevada, then you will find that said Roger Chaney was the agent of the plaintiff insurance company, and not the agent of the defendants, or either of them. (*D. C. Williams, et al. v. Pacific States Fire Ins. Co.,* 120 Or 1 at 7, 251 P 258 at 260, 29 Am Jur Sec. 136 at p. 538, 539, 540).

32. The court erred in failing to give appellants' requested instruction No. 3, as follows:

If you find that the witness Roger A. Chaney orally advised defendant Charlotte Arley that the dwelling house that she and her husband owned

near Verdi, Nevada, was covered by fire insurance, then such statement on the part of Roger A. Chaney would be binding on United Pacific Insurance Company and a contract of insurance would be thereby created which would be binding on United Pacific Insurance Company.

33. The Court erred in failing to give appellants' alternative requested instruction No. 3, as follows:

In this case, if you find that Roger A. Chaney before January 15, 1963, told Mrs. Charlotte Arley that the buildings owned by Mr. and Mrs. Arley near Verdi, Nevada were covered by fire insurance and named the United Pacific Insurance Company as the fire insurance company that would issue the policy, then I instruct you that your verdict must be in favor of the defendants, since the policy of insurance issued on the property would be completely binding on United Pacific Insurance Company and in the event of a fire loss, the defendants would be entitled to be paid by United Pacific Insurance Company for their loss. (*Western National Ins. Co. v. LeClare,* 163 F2d 337 (9th Cir 1946).

34. The court erred in failing to give appellants' requested instruction No. 4, as follows:

You are instructed that United Pacific Insurance Company in the instant case cannot be permitted to void the policy by taking advantage of any misstatement, misrepresentation or concealment, of a fact material to the risk, which is due to the mistake, fraud, negligence or other fault of its agent and not to fraud or bad faith on the part of the insured, who are the defendants Mr.

and Mrs. Arley. That is to say, if you find that there was any failure to disclose to United Pacific Insurance Company that a fire loss had occurred before the insurance policy had been issued, such failure to disclose would have no effect upon the validity of the policy of insurance since Roger A. Chaney was the agent of United Pacific Insurance Company. (*Williams v. Pacific States Fire Ins. Co.* 120 Or 1 at p 10, 251 P 258, 261).

The objection urged in the courts failing to give the foregoing instructions was that they were based upon the Oregon cases on the subject. (Tr. 265).

35. The court erred in stating the contention of the insurance company as follows:

"Now I will outline the contentions of the parties here. Generally speaking, it is the plaintiff's contention, that is, the United Pacific Insurance Company, that at the time this application for insurance was made by Roger Chaney on the 16th of January, he was acting as broker and agent for the defendants here in attempting to secure this insurance on this property rather than for the plaintiff, and that at the time of making this application to the plaintiff insurance company for this coverage he had knowledge that this property had already been destroyed by fire, and that he wilfully concealed and did not disclose the fact to the insurance company at the time the application for insurance was made.

"In other words, the plaintiff claims that Chaney under those conditions was acting as agent for the defendants and not as agent for the plaintiff. (Tr. 255, 256).

The objection urged was that the loss occurred on Janurary 16, and that Larry Nelson, the company's agent, had testified that he, Nelson, knew that the loss occurred on January 16. The application was not made until the following day, January 17. (Tr. 265-267).

36. The court erred in instructing the jury as follows:

> "Now, the principal issue to be decided by you in this case under the issues as formulated is whether Chaney, who had been named as solicitor by the Nelson Company, was during Chaney's discussions with Mrs. Arley on the 30th or 31st of October, 1962, acting for the defendants or was he acting for the plaintiff in the scope of his authority as solicitor for Nelson? The fact that Chaney may have been named as a solicitor for the plaintiff is not in and of itself controlling. You must weigh all of the evidence in the case and determine therefrom whether Chaney was in truth and in fact acting as a broker attempting to secure insurance for the defendants, or was in truth and in fact acting for the plaintiff. If Chaney was acting for the defendants in procuring this insurance then your verdict must be for the plaintiff. When I say 'in procuring this insurance', I mean if he was acting at the time he made this application on January 16th as agent for the defendants, then your verdict must be for the plaintiff. (Tr. 258, 259).

The objection urged was that under the statutes of Oregon, there can be no broker. Therefore Mr. Chaney could not act as a broker, that the statutes provide

for a licensed agent, a licensed solicitor and for only a nonresident broker.

A second objection was that under the law of Oregon an agent licensed in the State of Oregon to write insurance has authority to write insurance on property any place outside the state. (Tr. 268).

37. The court erred in instructing the jury as follows:

> "Now, if you find from a preponderance of the evidence that Chaney was the agent of the defendants in the attempt to procure this insurance, and failed to reveal to the United Pacific Insurance Company and wilfully concealed from the company the fact that the property had been damaged by fire prior to the written request to United Pacific Insurance Company for insurance on the property, then your verdict should be for the plaintiff, the United Pacific Insurance Company. (Tr. 260, 261).

The objection urged was that even if it could be possible for Chaney to act as a broker, it would not make any difference because the agent with whom he placed coverage was Larry Nelson, who, under the terms of the contract was in effect the United Pacific Insurance Company. (Tr. 269, 270).

38. The court erred in instructing the jury as follows:

> "If, on the other hand, you find that Chaney, on

or about October 30th or 31st, 1962, while acting within the scope of his authority with the Nelson Company, represented to the defendant Mrs. Arley that the buildings owned by the defendants near Verdi, Nevada, were covered by fire insurance and named the United Pacific Insurance Company as the fire insurance company that would issue the policy, and that the amount and date of the coverage was definite, and that the issuance of the policy here in question was the outgrowth of said representations, if any, then and in that event your verdict should be in favor of the defendants on the issues here presented." (Tr. 261).

The objection urged was that under the undisputed evidence Mr. Nelson and Mr. Chaney had no company in which they could write fire insurance except United Pacific and therefore the principal didn't have to be named. (Tr. 269).

39. The court erred in commenting on the evidence as follows:

"On these questions, your attention is called to the admission of Chaney and the testimony of Nelson to the effect that after the October conversation Chaney was told by Nelson that he did not have authority to write insurance in Nevada, and that Chaney attempted to place the insurance with other firms. This, of course, would have some bearing on whether Chaney made a definite commitment to Mrs. Arley to cover the property in the United Pacific Insurance Company for the sums mentioned on the 30th or 31st of October. Tr. 261).

The objection urged was that this is an incorrect statement of the law as to brokerage. (Tr. 269).

SUMMARY OF ARGUMENT

The trial court lacked equity jurisdiction in this case. The court should have dismissed the case or in the alternative should have transferred it to the District of Nevada.

The court had no power to compel appellants to file their counterclaim on the policy, but having required it, should have heard the counterclaim as a separate trial with a common law jury prior to hearing appellee's suit in equity. It was the *only* way in which the court could have protected appellants' right to jury trial.

The character of appellee's suit could not be changed by treating it as an action for declaratory judgment. The court could not thus enlarge its equity jurisdiction. Assuming jurisdiction was not wanting, appellee was not seeking any declaration of rights or liabilities *under* the policy. It was seeking rescission on the ground *the policy never existed.* This was the relief the court granted. It could do this only as a court sitting in equity. A federal court cannot cancel a policy for fraud by a judgment at law.

The relief granted was equitable relief; the jury had to be an advisory jury. The character of

the jury could not be changed to a common law jury by trying the action as though it were an action on the policy and by submitting to the jury issues which would normally be tried out in such an action.

The trial of the case should have been limited to whether or not there was fraud in the procurement of the policy, the *only* ground on which appellee sought rescission. The issues of Roger Chaney's authority and proof of the elements of an oral contract were issues not made by the pleadings. Whether Roger Chaney could be a broker was a question of law and should not have been submitted to the jury. Appellee was estopped to deny its agent and its policy.

I

IS AN INSURER ENTITLED TO MAINTAIN IN A FEDERAL COURT A SUIT IN EQUITY TO CANCEL A STANDARD FIRE POLICY AFTER LOSS HAS OCCURRED ON THE CHARGE THAT THERE WAS FRAUD IN ITS PROCUREMENT.

The court was of the opinion that "a Court of equity would have jurisdiction" (R. 35).

Directed to Specification of Error Nos. 3, 4, 6, 7, 10, 12, 16

The Supreme Court of the United States as early as 1871, in affirming the dismissal of the complaint in a suit to cancel life insurance policies, said:

"Where a party, if his theory of the controversy

> is correct, has a good defense at law to 'a purely legal demand' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is preparted to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventative remedy. Nothing of the kind is to be apprehended in this case, as the contracts, embodied in the policies, are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending in the court whose decree is under re-examination.
>
> "Courts of equity, unquestionably, have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause of action is 'a purely legal demand,' and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal court, as it is clear, that the case, under such circumstances, is controlled by the 16th section of the judiciary act." *Phoenix Mutual Life Ins. Co. v. Bailey,* 13 Wall. 616, at 623, 20 L.Ed. 501, at 503.

In *DiGiovanni v. Camden Fire Ins. Ass'n,* 296 U.S. 64, 68, 56 S.Ct. 1, 3 (1935), a suit to cancel a fire policy on the allegation that the policies were obtained by fraud, the Supreme Court said:

> "This Court has recently pointed out that equity will not compel the cancellation and surrender of an insurance policy procured by fraud where the loss had occurred and a suit at law to recover

> the amount of the loss is pending or threatened. *Enelow v. New York Life Insurance Co.*, 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440. The alleged fraud of petitioners, as well as their alleged destruction of the property insured, are defenses available in suits at law upon the policies. While equity may afford relief quia timet by way of cancellation of a document if there is a danger that the defense to an action at law upon it may be lost or prejudiced, no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law on the policies are imminent, and there is no showing that the defenses cannot be set up and litigated as readily in a suit at law as in equity."

In *Massachusetts Bonding & Ins. Co. v. Anderegg*, 83 F2d 623, 624, (9th Cir.) (1936) on an appeal from the District Court of Oregon, in a suit to rescind an automobile liability policy, this Court said:

> "Generally speaking, a suit in equity to cancel or rescind an insurance policy on the ground of fraud in its procurement cannot be brought after there has been a loss under the policy, since, in such a case, the insurer, by setting up the fraud as a defense when sued on the policy, has ordinarily, an adequate remedy at law."

In *Comer v. World Insurance Co.*, 212 Or. 98, 318 P2d 913, 915 (1957), a suit to cancel a disability policy, the Supreme Court of Oregon, citing *Massachusetts Bonding & Ins. Co. v. Anderegg*, supra, said:

> "In the absence of special circumstances — and none appears in the instance before us —

> equity will not, on charges that the issuance of the policy was induced by fraud, cancel the policy of insurance after loss, particularly when an action on the policy is pending."

In the present case the amended complaint discloses the fact of loss. The policy is made part of the complaint. By its terms the insured must bring his action on the policy within 12 months after loss, and may not bring it until 60 days after proof of loss. (Par. VI, IV, Exh. "A" lines 157-161; 150-156, R. 17). No special circumstances are alleged. No averment is made that a remedy at law is lacking, or that the legal remedy is inadequate.

Appellants never waived their objection to the court's lack of equity jurisdiction and do not now by further argument intend any departure from this position.

II

THE TRIAL COURT COULD NOT ENLARGE ITS JURISDICTION BY TREATING APPELLEE'S AMENDED COMPLAINT AS A PETITION FOR DECLARATORY JUDGMENT.

Directed to Specification of Error Nos. 15, 16

The original complaint in this case was entitled "civil complaint in equity for rescission." The prayer read:

> "WHEREFORE, plaintiff prays for a decree of this Court that defendants be ordered to surrender the said policy of insurance to the plaintiff to be cancelled and that the said policy of insurance be rescinded and held for naught." (R. 3, 4).

This prayer was not changed in appellee's amended complaint (R. 19).

The trial court refused to dismiss appellee's complaint for want of equity but at the trial the court of its own initiative treated appellee's suit as one for declaratory judgment. (Tr. 6). In a similar situation the Supreme Court of Errors of Connecticut held this was error.

In *Aetna Life Ins. Co. v. Richmond,* 139 A. 702 (Conn. 1927), the insurer sued in equity to cancel a life policy after the death of the assured. The defendant demurred to the complaint on the ground that the facts alleged were a complete legal defense to an action on the policy. The demurrer was overrruled and, upon failure to plead further, judgment was entered for the insurer, from which defendant appealed. The Court said:

> "It is quite obvious that the plaintiff sought to state an equitable cause of action, and had not contemplated a proceeding under the Declaratory Judgment Act until the trial court based its decision of the demurrer upon the terms of this legislation, the purpose of which is to declare rights rather than to execute them.

> "This complaint in no way suggests that a declaratory judgment is sought. It does not ask the court to declare the rights of the parties. Where such judgment is desired, it should be so stated with precision, in an appropriate prayer for relief whether standing by itself or combined with a prayer for affirmative consequential relief.
>
> "The challenge of the demurrer was not whether the complaint stated valid ground for a declaratory judgment, but whether it was an adequate statement of an equitable cause of action against the defendant. The trial court therefore held the complaint good on a ground not claimed and failed to decide the question which the demurrer presented.

In *Palmer v. Walsh,* 78 F. Supp. 64, 65 (D.C. Ore. 1948), in an action brought by a civil service employee for reinstatement, the District Court of Oregon in an effort to determine what relief plaintiff was seeking, on the question of declaratory judgment said:

> "If the instant action be viewed as asking for a declaratory judgment of plaintiff's rights, the court lacks jurisdiction of the cause, since it is undisputed that the Declaratory Judgment Act, 28 U.SC.A. sec. 400, did not enlarge the jurisdiction of the District Courts of the United States. See *Putnam v. Ickes,* 64 App. D.C. 339, 78 F2d 223, at page 226* in which it was said:
>
> 'The right of the court to assume jurisdiction

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* Cited by this Court in *Southern Pac. Co. v. McAdoo* 82 F2d 121, 122, (Cir. 9th).

> is to be determined by the principles laid down in the Judicial Code. The Declaratory Act is in no respect amendatory of the Judicial Code either directly or by implication. If Congress had intended by this act to extend the jurisdiction of the courts in cases arising under it, it would have so stated in the act, and in the absence of such statement or language clearly implying such intent, the act must be limited to the jurisdiction expressed therein.' "

It is to be noted in the present case that appellee specifically rejected the court's treatment of its cause as an action for declaratory judgment. At the close of trial, in addressing the Court, counsel for appellee made the following statement:

> "MR. ROBERTS: Your Honor, the plaintiff would join in such a motion, and moves the Court for an order directing a verdict in favor of the plaintiff, and for the Court to enter judgment and decree in this case — *not a declaratory judgment*, but of rescission of the policy that was issued. (Italics ours). (Tr. 251).

Indeed, the whole theory of appellee's case was to negative the existence of a policy — not to seek a declaration of rights under it.

In this case Sec. 267 of the Judicial Code, 28 U.S.C. sec. 384, forbidding equity suits where an adequate legal remedy exists, is controlling.

It may be further noted that the relief given appellee

was equitable and followed the language of its prayer. (Supra, p 29). The court's order reads:

> "IT IS ORDERED AND ADJUDGED that the policy of insurance no. F78185, issued by plaintiff to defendants be, and the same is hereby, cancelled, rescinded and held for naught; and that defendants' counterclaim be, and the same is hereby, dismissed with prejudice." (Judgment, R. 69).

III

DID THE METHOD OF TRIAL DEPRIVE APPELLANTS OF THEIR CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

Directed to Specification of Error Nos. 5, 6, 7, 9, 13, 14a

In denying appellants' motions for new trial and for judgment notwithstanding verdict, the court said:

> "Since defendants insisted on a jury trial and were notified by the court some months prior to the trial that the issues of fact would be submitted to a jury, they are not now in a position to complain of the court's action in treating the proceeding as an action at law for a declaratory judgment and in submitting the issues of fact to a jury." (R. 72).

This was February 2, 1965, almost two months after trial.

However as late as August 11, 1964, the court said:

> "I will stay with my previous rulings on the jurisdictional phase * * * without prejudice to

> renew the motions on the jurisdictional questions at the close of the plaintiff's case."

At that time the court ordered the parties to file a pretrial order and also ordered defendants to present their counterclaim. (Order, R. 49).

The pre-trial order was lodged September 29, 1964, and filed on the day of trial, December 14, 1964. (R. 90). In the pre-trial order appellants contended they

> "may not be compelled to file a counterclaim * * because plaintiff has no claim in equity which this court may entertain and because there is a prior action at law pending * * before the * * District Court * * of Nevada." (Par. VIII, R. 58)

Appellants also demanded a separate and prior trial by jury on the counterclaim required to be presented. No reply to this counterclaim was made by appellee. (Pretrial order "9", "10", R. 59).

On October 1, 1964, the court, by letter, advised counsel for the respective parties that the court "was giving serious consideration to submitting to a jury all of the issues of fact in this case." (Designation of Record, "16", R. 78).

Appellants respectfully submit that to the moment of trial they believed, as they had the right to believe, that the court would either (1) try appellee's equity

suit with an advisory jury or if indeed the counterclaim had been "filed", would (2) proceed under Rule 42(b) to try the counterclaim with a common law jury.

> "Rule 42(b) specifically gives the power to the court to prevent 'prejudice' such as that to the plaintiff's right to trial by jury by 'order(ing) a separate trial of any claim' here by ordering first a separate common law trial by jury on the issue of damages, in which the issue of infringement and the amount of damages will be determined before the issue on the equitable issues."

Bruckman v. Hollzer, 152 F2d 731, 732 (9th Cir. 1946)

Beacon Theatres, Inc. v. Westover, 79 S.Ct. 948, 955; 359 U.S. 500, 508

Appellants could not foresee that the court would impanel a special jury in a declaratory judgment action and submit to such a jury issues which could be tried only in an action on the policy. No such jury was demanded and under the circumstances of this case no such jury could have been demanded. Appellants respectfully submit that the verdict in this case cannot be regarded as binding on the court.

FRCP 39(c)

(*American*) *Lumbermens Mut. Cas. Co. v. Timms & Howard*, 108 F2d 498 (2nd Cir. 1939)

Compare *Palmiero v. Spada Distributing Co.*, 217 F2d 561 (1954): Spada initiated the litigation by a suit in equity. All the equitable issues having passed out of the case prior to trial, the court tried it as an action at law, reversing the order of the parties. Then, of its own motion, the court submitted the cause to the jury on special interrogatories and failing to submit all the issues made findings of fact after the jury was dismissed.

The Ninth Circuit Court held that Palmiero was prejudiced by the trial court's failure to take a general verdict, and held that a new trial was required to do justice between the parties.

It is to be noted that in the present case counsel for appellee did request that the issues be submitted to the jury on special interrogatory:

> "MR. ROBERTS: Your Honor, I realized when we submitted instructions that the Court would have some problems. As I read the defendants' instructions and also my own, the only thing I would inquire of the Court is whether the Court would submit to the jury a special interrogatory rather than a verdict form.
>
> "THE COURT: If we get into interrogatories we are getting into what issue is this and what issue is that, and we will have all the little side issues involved. So I am submitting a form of verdict that if they find one way their verdict will be for the plaintiff * * *." (Tr. 253, 254).

Earlier the Court had said:

> "I am not going to definitely give an instruction on the question of what is or what is not an estoppel, because I believe that amounts to an estoppel in itself if these were the facts." (R. 252)

No such instruction was given. Appellants respectfully submit it was error for the court to refuse to give appellants' requested instruction on estoppel, No. 4, (Supra, p 19, 30).

As related to this question and as separate from the question of venue appellants respectfully submit that by trying this cause as one in equity their rights have been substantially prejudiced in the following respects:

(a) The control of forum by appellee.

Mutual Life Ins. Co. v. Marzec, 262 NYS 558

Crosley Corp. v. Westinghouse Elec. & Mfg. Co., 43 F. Supp. 690

(b) The inversion of the parties in the trial of the action.

(c) The loss of attorney's fees as provided by ORS 736.325 in the trial court and on appeal should appellants ultimately prevail.

Assuming arguendo that the court otherwise had jurisdiction to try appellee's suit as a declaratory

judgment action, appellants respectfully submit that it was error to entertain the action because appellee was really trying out the validity of a defense which should have been determined in the action at law. Further, had the action determined the status of Roger Chaney, it would in no event have been "destructive" of appellee's case.

Aetna Casualty & Surety Co. v. Quarles, 92 F2d 321 (4th Cir. 1937)

Fireman's Fund Ins. Co. v. Hanley, 140 F.Supp 206, 213 (1956)

Employers Mutual Liab. Ins. v. Bluhm, 227 Ore. 415, 362 P2d 755 (1961)

Venue:

Tr. 81

Commonwealth v. Rutherfoord, 169 S.E. 909, 90 ALR 348

McGrath v. Zander, 179 F2d 649 (Dist. Col. 1949)

IV

UNDER THE STATUTORY LAW OF OREGON ROGER CHANEY COULD NOT ACT AS AN INSURANCE BROKER.

Directed to Specification of Error Nos. 19, 23, 36, 39

"* * the insurance laws of this state are for the protection of the insurance buying public. Such

> laws shall be liberally construed and shall be administered and enforced by the Insurance Commissioner to give effect to this policy."
>
> Proposed Preamble to Insurance Code, Report of Legislative Interim Committee on Insurance, January 1965.

A resume of Oregon's insurance law makes impossible any conclusion except that every person licensed under the General Insurance Law in the State of Oregon must be regarded as the agent of the insurance company and not the agent of the insured in all matters relating to insurance.

The original insurance act was passed in 1887. In the Laws of Oregon, 1887, p. 124, section 19, "broker" was defined as:

> "* * any person who solicits insurance, receives an application or order to write, renew or procure any policy, or collect any premium, or who attempts as middleman to place any fire insurance in this state *when such person holds no authority as agent from any insurance company or general agent of such company,* shall be deemed an insurance broker * * *" (Italics ours).

"Agent" was first defined in the Laws of 1899, p. 187, 188 as:

> "* * *any person who solicits insurance, receives an application or order to write, renew or pro-

> cure any policy or collect any premium, or who attempts as middleman to place any fire insurance in this state, shall be deemed an insurance agent * * *."

The present insurance code was enacted in 1917. That act, Chap. 203, p. 312, repealed Section 4665, Lord's Oregon Laws, the section then defining "broker." The section defining "agent" remained.

In 1923, Chap. 79, p. 109, an act "to provide for the licensing of nonresident brokers of insurance in the state of Oregon" was passed. That act now appears as part of Chapter 750 of the Oregon Revised Statutes.

In 1943, by Chapter 445, p. 668, "agent" was redefined and "solicitor" was for the first time separately defined. For the first time provision was made for the examination of both. (p. 673). These definitions and provisions appear in the present insurance law, entitled "Insurance Law Generally" and is contained in Title 56, Chapter 736 of the Oregon Revised Statutes.

> ORS 736.005(e) defines "Insurance agent" or "agent" as "a person authorized in writing by any insurance company lawfully authorized to transact business in this state to act as its representative, with authority to solicit, negotiate and effect contracts of insurance in its behalf * *."

> ORS 736.005(f) defines "Insurance solicitor" or

"solicitor" as "an individual authorized by a duly licensed insurance agent to solicit contracts of insurance solely on behalf of such agent.

ORS 736.410(1) provides that "Every person * * licensed as an insurance agent * * may employ * solicitors. *"

ORS 736.425(1) provides that "No license shall be issued * to any person except an insurance agent or insurance solicitor as defined in ORS 736.005."

Chapter 736, the General Insurance law of Oregon, *contains no provision for the licensing of brokers.*

Chapter 750 of the Oregon Revised Statute contains the law regarding nonresident brokers.

ORS 750.220 provides that "No person shall *in this state* act as an insurance broker, unless such person is a regularly qualified and licensed broker or agent of another state, and until such person has first obtained a license from the State Insurance Commissioner * *." (Italics ours)

ORS 750.210 defines a nonresident insurance broker as "any person *not a resident of this state* * * * who, for compensation, acts, or aids in any manner in negotiating contracts of insurance * * or placing risks, or effecting insurance * * for a party other than himself." (Italics ours)

ORS 750.230(1) requires that "the application * shall state that the applicant intends to hold himself out and carry on business in good faith as an insurance broker, * *", and

ORS 750.270(1) provides for the revocation of the broker's license, if the licensee "is not holding himself out and actually carrying on business as an insurance broker" * * whereupon

(3) "The commissioner shall publish a notice of the revocation of a broker's license in such manner as he deems proper for the protection of the public." Compare with ORS 736.470 which provides that on the revocation or suspension of any agent's or solicitor's license, the commissioner "shall file a a copy of this order in his office and mail a copy to the party holding said license, or to the party applying for the issuance of a license, at the address given in the application."

Appellant's research has failed to disclose any Oregon case construing these sections of the insurance law on "brokers".

The following is an Opinion of the Attorney-General 1922-1924, p. 414, 415, interpreting Chapter 79, Laws of 1923, the original law regarding nonresident brokers:

"There is a marked distinction between an insurance agent who represents and acts for a particular company, and a mere broker who is not employed by any specific company but whose business is to procure insurance for such persons as apply to him for that service.

"It is a familiar rule of construction that when a statute uses a term which has a well-known meaning at common law, or where the term used in a statute has acquired a settled meaning through judicial interpretation, it will be presum-

ed, that such term was so used in the statute, in the sense in which it was understood at common law, or as judicially construed, unless by qualifying or explanatory addition the contrary intention of the Legislature is made clear. 25 R.C.L. 292 et seq.

"The question then arises: Is there anything in the statutory definition of a nonresident insurance broker contained in chapter 79 which evinces an intention on the part of the Legislature to change the settled meaning of the work 'broker' and to use the term in a sense radically different from which it is generally understood by the courts?

"The answer to this question must be in the negative."

"From a careful analysis of the entire statute and a comparison of the same with the other insurance laws of Oregon, I conclude that it was not the intention of the Legislature, when defining a nonresident broker, to ignore the distriction between regular agent of an insurance company and a broker.

In *Strangio v. Consolidated Indemnity & Ins. Co.*, 66 F2d 330, 334 (1933), the Nnith Circuit Court had before it the question of whether a clerk for the Southern Pacific Company who had been sending in applications to an insurance company for several years was the agent of the insured or the insurer. At the time of submitting the application in question, Matthias was not licensed. In California the Political Code (Section 633a) did define insurance brokers.

Under the facts of that case, the Ninth Circuit Court held that Matthias was "simply an insurance broker."

> "And, being a broker, he was, under the general law, the agent, not of the insurance company, but of the insured."

> "Again, in Cooley's Briefs on Insurance (2nd Ed.) vol. 5, pp. 4065, 4066, we find the following language: 'Generally, the question as to whether a person through whose aid a policy is procured is the agent of the insurer or the insured is raised with reference to insurance brokers. By the weight of authority, a broker who merely solicits applications, and afterwards places the insurance with such companies as he can induce to take the risk, is regarded as the agent of the insured, * * *.'"

> "Conceding that notice to a duly authorized agent of the insurer would be sufficient, notice to one who is the agent of the insured, or *whose only relation to the insurer is that of broker,* is not notice to the insurer.' Cooley, supra, vol. 7, p. 6083." (Italics ours)

Finally, the Court said (p. 336):

> "This cause is not governed by the law which makes the insurer liable where the local agent was authorized to and did make an oral contract of insurance. Here, as we have seen, Matthias was a mere broker of the insured, *and in no sense the agent of the insurer.*" (Italics ours)

V

THE COURT ERRED IN OVERRULING APPELLANTS' CONTENTION THAT THE ONLY DEFENSE AVAILABLE TO APPELLEE WAS ITS ASSERTED AVERMENT THAT APPELLANTS FAILED TO DISCLOSE PRIOR LOSS

Directed to Specification of Error Nos. 2, 11

Appellants contended that:

> "Plaintiff is estopped from relying on any asserted allegation or defense except its asserted allegation that defendants failed to disclose to plaintiff that the property had been damaged by fire prior to the issuance of the policy." (Pretrial Order, Par. V, R. 57)

At some time prior to April 2, 1963 appellee had taken statements from its agent, Larry Nelson, and its solicitor, Roger Chaney, and had interviewed appellants. (Tr. 55, 80, 242). Thereafter by letter dated April 2, 1963, appellee stated the following as its reason for denying liability:

> "As you know, without any disclosure to the Company, the property for which coverage was requested had been damaged by fire prior to the time the application for insurance was made or any policy issued. Therefore, under the circumstances, such policy is void and of no force and effect and is rescinded as of its inception date." Pl's Exh. No. 56)

Having knowledge of all the facts and declaring its reason for refusing to pay on a stated ground appellee waived every other ground of objection.

Santino v. Great American Ins. Co. of N.Y. (Nev.) 9 P2d 1000, 1004

Travelers Ins. Co. v. Peerless Ins. Co., (Or. 9th Cir.) 287 F2d 742

Appellee's original complaint, first stating that the policy of insurance was requested on January 17, 1963, "and that pursuant to the request, the said policy was backdated to the 12th of January, 1963," alleged:

> "That the defendants did not disclose to the plaintiff at the time the policy of insurance was requested on the 17th day of January, 1963, that the said * dwelling had already been * damaged by fire on the 15th day of January, 1963 * * (Par. VII, R. 2)

The same allegation appears in appellee's amended complaint. (R. 17). There also appears in the amended complaint as a fifth cause of action an allegation not earlier made which states:

> "That the defendants requested *Roger Chaney* to procure insurance on the property * *; that the said Roger Chaney, at the time * he made application to the plaintiff insurance company for coverage, had knowledge that the * property had been damaged by fire, which fact was not made known to the plaintiff at the time the said application of January 17, 1963 was made." (Par. II, R. 19). (Italics ours)

In the pretrial order appellee for the first time contends:

> "That one Roger Chaney *acted as a broker and agent* for defendants in procuring insurance on the aforesaid property. That the said Roger Chaney at the time of making application to the plaintiff for coverage had knowledge that the said property had been damaged by fire and did not disclose said fact to plaintiff at the time said application for insurance was made." (Par. XII, R. 56). (Italics ours)

Finally, at the time of trial appellee amended the pretrial order by adding to paragraph XII, supra, the words "willfully concealed" after the words "had been damaged by fire and."

This, then, is how appellee developed the theory of its case. What was initially an allegation of fraud by the appellants in the procurement of the policy becomes the fraud of Roger Chaney. But even if fraud can be imputed to Roger Chaney it avails the company nothing because Roger Chaney is its agent and it would be estopped to defend on that ground. Therefore Roger Chaney must be abandoned. But neither the law nor the facts allow this. Appellee at trial therefore urges an issue not made by the pleadings — that Roger Chaney's authority to write insurance on October 30 or 31, 1962, was limited. (It is to be noted that appellee's allegation is that Roger Chaney acted for the Arleys on January 17, 1963.

There is no allegation that Roger Chaney acted for the Arleys in October). Chaney's authority to write the Arleys' insurance was limited, appellee says, because on that day neither Larry Nelson nor Roger Chaney had a Nevada nonresident's license.

VI

THE APPELLEE WAS ESTOPPED TO DENY THAT AUTHORITY OF ITS AGENTS, OR THE VALIDITY OF ITS POLICY.

Directed to Specification of Error Nos. 10, 16-20, 22, 24-28, 29a-32, 34, 35, 37-39

The fact is that Roger Chaney's authority was not limited. He had previously written insurance on the Nevada properties and when he wrote those policies he had no Nevada license. (Tr. 114-116). As to the authority of the Larry Nelson Agency to write the business Mr. Chaney himself testified:

> "I knew we could write the business or have it written *but not having a license we couldn't share in the commission*" (Tr. 70). (Italics ours)

Nothing in the Oregon law prohibits an agent licensed in Oregon from writing insurance on properties outside the state. Nothing in Larry Nelson's agency agreement with United Pacific prohibits him *or the solicitors for which the agreement provides* from writing insurance on property outside the state. (Pl's Exh. No. 11)

The law of Nevada does require that all policies on property in that state shall be countersigned by a resident agent and it does provide that commissions may be paid only to nonresident agents licensed under its laws.

NRS 684.330:

> 1. A company may pay money or commission for or on account of the solicitation or negotiation in this state, or elsewhere, of contracts of insurance * * on property or risks in this state only to its agent, nonresident agent, broker, or nonresident broker, duly licensed under this Title * * *"

NRS 684.350: "Countersignature of policies.

> 1. All policies of insurance * * on any property * * located * * within this state, shall be countersigned by a resident agent licensed under this Title to represent the insurer * * *.
>
> 3. Where a contract of insurance covering property * * within this state is negotiated by a licensed nonresident agent or broker outside this state, *or by a company which is not represented by a licensed nonresident agent or broker,* every such policy of insurance * * * shall be countersigned by a resident agent who is compensated on a commission basis * * *" (Italics ours)

The fact is that United Pacific *did write the policy.* And when it wrote the policy it knew neither Chaney nor Nelson had a nonresident license. (Pl's. Exh. No. 8, R. 155, 156). Mr. John Gordon, office manager for United Pacific so testified (Tr. 156):

Q. Did Mr. Nelson say whether or not he had renewed the Nevada license?

A. No, he said that he hadn't renewed. Actually, it would be renewed through us. I mean we would normally be the ones to start the wheels in motion to renew it.

Q. Did you at that time know when his license had expired?

A. Yes.

Q. When had it expired?

A. It expired on — let's see — April 30, 1962.

Q. Did you subsequently renew it?

A. Yes, only — it was renewed effective, I believe, May 1st, 1963.

In *Hahn v. Guardian Assurance Co.*, 32 Pac. 683 (Or. 1893), prior to statutes defining the authority of agents (supra p. 17), the insurer sought to defend on a similar ground. An agent had solicited insurance on property in Washington. After loss the insurer denied liability on the ground the agent was a special agent with limited powers, and with no authority to write insurance outside of Multnomah County, Oregon.

> "The testimony for the plaintiff shows that Ackerman represented himself to be the agent of defendant, and solicited the insurance of plaintiff's property; that he negotiated the insurance of his property in the State of Washington with

Ackerman, and with no other person; that he left the matter of the insurance wholly with Acker-, man, and left for New York, supposing that he had full authority to act as agent for the company in the state of Washington, and without knowledge or information of any limitation on his powers; that he received the policy from Ackerman, and paid him the premium for it. Upon the part of the defendant, the record discloses that it accepted the risk, issued the policy, received the premium without objection and treated the policy as valid until after the fire. Upon this state of the case the plaintiff contends that the defendant, by its conduct, held Ackerman out as its duly accredited agent, and he was justified in assuming that he had full authority to effect the insurance. The defendant, by its testimony, sought to limit the authority of Ackerman to that of a local agent, whose jurisdiction was confined to Multnomah County, and consequently that he had no authority to write policies or to take risks on buildings in the state of Washington, nor to speak for or bind the company in relation to any risk outside the territory."

The Supreme Court of Oregon held: (p. 684)

"The acts of an agent performed within the scope of his real or apparent authority are binding upon his principal. It is enough if, under all the circumstances, he had apparent authority in the matter, although in fact his authority was limited."

Hardwick v. State Ins. Co., (1891) 20 Or 547, 26 Pac 840, 844

Union Ins. Co. v. Wilkinson, 13 Wall. 22, 20 L.Ed. 617

Hahn v. Guardian Assurance Co., 32 P. 683, supra, is reported in 23 Or. 576. A footnote refers to *Phoenix Assurance Co. v. Wachter*, (Pa.) 19 Atl. 289. The following is quoted at page 290:

" 'The general rule that a principal is responsible for the misrepresentations of his agent, within his authority is beyond question; and the better opinion is that, as to third parties affected by his acts or words, it is the apparent scope of his authority, and not his actual instructions, that must govern. That is the basis on which the business of the world, in the present day, is transacted; and the rule should be enforced, in a liberal spirit, with regard to the actual habits of the community.' * * * 'It would be disastrous to commercial as well as other interests if a person, by acting through the agency of another, could shield himself from liability for such person's acts *ad libitum*. Fortunately, no such rule exists; and he who entrusts authority to another, in whatever department of business, is bound by all that is done by his agent within the scope of his apparent power, and cannot screen himself from the consequences thereof upon the ground that no authority in fact was given him to do the particular act, unless the act was clearly in excess of his apparent authority, or was done under such circumstances as to put him upon inquiry as to the agent's real authority.

"Perhaps it may be said that, while the evidence referred to tends to create an estoppel, the question of Spofford's real or apparent agency in the premises, etc., should have been submitted to the jury under proper instructions. That would be so, if there was any conflict of testmony, but

there is none. All the essential facts are clearly and conclusively established by uncontroverted evidence, part of which was introduced by the company itself. When the facts are admitted, or established beyond all controversy, as they are in this case, there is no necessity for submission to a jury. It then becomes the province of the court to declare the law applicable to such facts. That was done in this case; and, for reasons above suggested, we think there is nothing in the record that calls for the reversal of the judgment."

Universal Ins. Co. v. Kruse, 306 F2d 661 (9th Cir. 1962)

Appellee also urged (supra p. 19) that Roger Chaney made some inquiries as to how the insurance might be written (Tr. 70). It is equally clear that Mr. Nelson — if such inquiries were made — had knowledge of them (Tr. 15). The record is clear that the Arleys dealt with Mr. Chaney only as an agent or solicitor in association with Larry Nelson and not as a *broker.* (D's Exh. Nos. 51, 52, 57, 68, 75).

MFA Mutual Ins. Co. v. Jackson, 271 F2180 (8th Cir. 1959)

In *Mock V. Glen Falls Indem. Co.,* 210 Or. 71, 309 P2d 180, (1957) the company refused to extend coverage under an automobile liability policy. The agent told Mock he would get such coverage for him — that he would get or write a different policy, but that meanwhile he would continue to be covered.

> "Pratt attempted to get driveaway coverage from Lloyds of London, but he felt the premium was too high, and he finally concluded to write a comprehensive liability policy with Glen Falls."

No attempt was made in *Mock* to hold that its agent had "acted" as a broker.

In an early and leading case, another insurer urged that a soliciting agent was not an agent of the company but a mere broker because the policy contained a provision that no one except a person authorized in writing shall be considered the agent of the company. In that case Strecker was employed to solicit business exclusively for the insurer's agent, Van Alsyne. The court said:

> Mr. Van Alsyne whose firm employed the solicitor "denominated this kind of service as the service of a broker, and he also stated that Mr. Strecker was at liberty to work for any other insurance company if he pleased. *If he meant that Mr. Strecker had the power to violate his agreement with them, and instead of working exclusively for them, work for others, why that is self-evident proposition, and has no bearing upon the question as to the capacity in which he was employed by them.* If he meant to assert that he was not exclusively employed by them, then it is a contradiction of what the witness has already several times stated to be the truth, and the fact of exclusive employment, if material, should have been left to the jury to determine." (Italics ours)

The question of Mr. Chaney's employment is governed by statute (supra p. 39, 40)

On the final ground urged — that Roger Chaney had wilfully failed to disclose to United Pacific that the property was already damaged when he ordered the policy — the record is clear that Larry Nelson, the duly authorized agent for United Pacific, knew on the day of the loss, and on all the days that followed to the time he sent his statement and the policy to appellants that the property was damaged. (Tr. 15, P's Exhs. 11). The record is clear that Porter James Courtney, staff adjuster at United Pacific Insurance company, knew. And the record is clear that Roger Chaney, licensed solicitor for United Pacific knew. While appellants are not required to know and are not charged with knowing "the insurance business, and the relationships between the insurance companies, insurance brokers, and insurance agents (*Universal Ins. Co. v. Kruse*, 306 P2d 661, supra, p. 52) appellants respectfully suggest that Roger Chaney was doing on January 17, 1963 what he should have done in October or November of 1962. (R. 143).

Appellee's creation of a separate "United Pacific" from whom Roger Chaney could (1) conceal the fact of damage or from whom Roger Chaney in the place and stead of appellants could (2) order a policy, falls in light of ORS 736.475, which provides that

> "No foreign or alien company authorized to transact insurance * * in this state shall make, write, place or cause to be made, written or placed,

> any policy * * except through its regularly commissioned and licensed resident insurance agents * *",

in this case, Larry Nelson.

Appellants respectfully submit (1) that having issued its policy appellee was estopped as a matter of law from denying the authority of its agent, (2) that the issue of Chaney's authority was outside the scope of the pleadings, but having been introduced, the trial court erred in not submitting this issue to the jury.

VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IF CHANEY DID NOT NAME THE COMPANY THEY MUST FIND FOR THE APPELLEE.

Directed to Specification of Error Nos. 33, 38

If in the trial of appellee's suit to rescind its policy, it was necessary for appellants to prove the elements of an oral contract, the court's instruction was nonetheless improper because on the undisputed facts in this case there was but one company in which Larry Nelson could write Nevada coverage — and that company was United Pacific. Roger Chaney testified:

> Q. Now was it a fact that in all of this period of time, that is to say, from October of 1962 until March of 1963, in that general period of time, the United Pacific Insurance Company was the only company that was licensed to write fire

insurance under the laws of Oregon as well as under the laws of Nevada.

A. In our office that is true.

Q. In your office, that is, you couldn't have written it with any other company except United Pacific?

A. That is true.

Q. That was true in October of 1962 as well as it was in January and later?

A. Yes, as far as our office goes (Tr. 97, 98).

Western National Ins. Co. v. LeClare, 163 F2d 337 (9th Cir. 1946)

Croft v. Hanover Fire Ins. Co., 21 S.E. 854

CONCLUSION

Appellants respectfully submit that (1) the trial court had no jurisdiction in this case and appellee's suit should have been dismissed. (2) The method of trial substantially prejudiced appellants' rights and deprived them of their constitutional right to trial by jury.

Appellants are entitled to judgment on the pleadings and on the uncontradicted evidence as a matter of law because the policy issued by appellee was procured through its duly authorized agent and evidenced the agreement made by the parties.

Appellants therefore respectfully request one of the following three alternatives:

1. That the judgment of the lower court be reversed with directions to dismiss appellee's suit.

2. That the judgment of the lower court be reversed with directions to enter judgment for appellants.

3. That the judgment of the lower court be reversed with directions for a new trial.

Respectfully submitted,
CHARLOTTE HUNTER ARLEY
Attorney for Appellants

APPENDIX

INDEX OF EXHIBITS

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED this 27th day of August, 1965.

CHARLOTTE HUNTER ARLEY

Attorney for Appellants